No. 3932

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff, Appellant,

vs.

JOSEPH WOERNDLE,
Defendant, Respondent.

BRIEF OF RESPONDENT

Upon Appeal from the United States District Court for the District of Oregon.

JOHN S. COKE,
United States Attorney for Oregon,
for Appellant.

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STATEMENT.

This is a suit to cancel the citizenship of the defendant herein. After hearing the evidence, the trial court dismissed the bill, stating in its opinion among other things:

> "There is no evidence of a single act, statement, or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary, I have not been referred to a case in which a certificate of naturalization has been cancelled and set aside upon such proof, nor have I been able to find one."
>
> (Trans. P. 116).

The act of the defendant on which the government based its suit occured in 1914, and a reading of the Bill of Complaint and the affidavit attached thereto clearly show that the only accusation made therein was that of furnishing a passport to one certain Hans Boehm. No complaint of any kind was made at that time of any action of the defendant's in writing the letters which now appears to be the principal contention of the appellant.

In order to bring the admitted facts before the court, a short chronological history of the case is necessary.

October 1914—Defendant furnishes his passport to Boehm for purposes hereinafter stated.

December 1918—The Government through an admittedly void and illegal search warrant (Trans. P. 48) made a forcible search and seizure of the defendant's home and office and seized a truck load

of private memoranda, letters, papers and other personal property.

April 1921—(Seven years after happening of offence complained of.) The Government files a Bill in Equity to cancel the citizenship of the defendant by reason of his action in 1914.

Thereupon defendant filed a motion to dismiss the complaint on several grounds, including (a) "That it appears on the face of the bill of complaint that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for. (b) Because the cause of suit as alleged in the said bill of complaint has not accured within five years next preceding the filing of the complaint as required by law and it so appears from the face of the bill of complaint. (c) That said bill of complaint was not filed in the said court within the statutory period required by law and it so appears from the face of the bill of complaint. (d) That the affidavit attached to said bill of complaint did not show good cause therefor as required by law." (Trans. P. 26).

This motion was overruled in toto by the trial court and defendant was required to answer, which he did, setting forth as part of his answer the identical motions heretofore described.

Immediately after filing his answer, the defendant filed a motion "For the Return of Private Papers, Books and Documents" (Trans. P. 33), which motion not only requested the return of originals, but also "any and all copies, stenographic or photographic or otherwise made thereof." At the hearing of

the motion the United States District Attorney in open court admitted the illegality of the process which had secured these documents for him in violation of statutory and constitutional provisions and made no objection to the motion as far as the originals were concerned, and the court ordered their return, but on objection of the District Attorney the court refused to order the return of any or all copies made of said originals (Trans. P. 38) and shortly thereafter the court ordered the production at the trial of the identical documents heretofore ordered returned to the defendant (Trans. P. 60). At the trial these documents and particularly a number of letters were introduced in evidence over the objections of the defendant (Trans. P. 67) made at the trial and also reserved in the stipulation. These letters were considered by the trial court and disposed of with the following comment:

> "It all relates to his (defendant's) acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events." (Trans. P. 116.)

The facts as the appellant states were not disputed, but they were not for the greater part stipulated, as the defendant testified in person and offered himself for cross-examination to the court and prosecution, and the defendant's testimony, which facts as well as the others, as the appellant states were not disputed, show among others the follow-

ing: That with the exception of the first passport furnished to Boehm by the defendant practically all the other actions of Boehm in the matter were without the defendant's knowledge or responsibility. (Trans. P. 121).

That the defendant, the child of poor parents, was only enabled to secure an education through the self-sacrifice of his father and brothers and that at the age of sixteen the defendant applied for and was given a certificate of expatriation renouncing his German citizenship; which certificate deprived him from all vestige of German citizenship (Defendant's Exhibit A. and Trans. P. 172).

That the defendant was opposed to the German military system and that therefore in 1897 he went to the United States, and that from the first dollar he earned he contributed to the support of his father and brothers in Germany until finally he was their entire and sole support; that he married an American girl and is now the father of three children and that neither his wife or children understand or speak the German language (Trans. P. 173).

That after receiving letters from home, after the outbreak of the European war, and realizing the hardships and suffering of his people in Germany, he wanted to go to his father's assistance, but that the defendant could not go on account of his family here, and that when Boehm offered to go, he let Boehm have his passport; that he did not consider the consequences of the passport incident in connection with the United States; that he had only in mind to give what aid he could to the place of his

birth and to bring aid to his father. (Trans. P. 173-174.)

That at that time defendant had two brothers in Germany, one with five children, the other with seven; that there then was no one at home to take care of his father and step-mother and that his parents were in want all the time, and that the defendant received letters from his father imploring him not to forsake them in their misery. (Trans. P. 175).

That the defendant wrote many letters to his relatives enclosing remittances, but none were delivered; that therefore he was willing to resort to almost any means to get word to his relatives and this gave him the idea of showing sympathy for the other side and saying many things merely to expedite things and get the letters through the German censor. (Trans. P. 175-176.)

That after the United States entered the war, the defendant did everything he knew to be helpful or useful to the United States; that he made reports to the United States Attorney "whenever anything didn't look right," and that the records of the United States Attorney's office show the making of some of these reports, and that in one particular case the matter was of sufficient importance to be referred to the United States Military Department (Trans. P. 177-178.)

That the defendant bought Liberty bonds during the war with all his means and even invested trust funds in his hands in this manner; that he always made liberal donations to the Red Cross, Y. M. C. A. and other war activities; that he notified

the Alien Enemy Property Custodian of all the property of aliens in his possession, including Boehm's, and that he voluntarily turned over to the United States Intelligence Bureau or the Department of Justice all Boehm's effects, including sealed envelopes, letters, etc.; that this was six months "prior to the raid upon him" and that he was told "Keep them, that is all right." (Trans. P. 178-179.)

That a good part of defendant's time was taken up with questionaire work of Austrian people, for which he made no charge and that the defendant advised aliens not to claim exemption and told them "that as long as they were making a living they ought to stand by the country that gave them shelter;" that as a result of defendant's efforts in this connection there were only two cases in which the alien enemy did not waive exemption. (Trans. P. 178.) A certain Otto Berg also testified in this connection that he had personal knowledge of two or three aliens or alien enemies whom the defendant advisd to go to war after the United States' entry therein. (Trans. P. 181.)

Defendant also testified further in his own behalf that he was never arrested during his residence (twenty-five years) in the United States; that he was a tax-payer, and all that he had was in this country; that he had no thought of disloyalty to the United States; that he never did anything that conflicted with the interest of the United States, and that in reference to the Boehm passport application he testified "I didn't look upon this passport ques-

tion in the first instance that way; in fact never gave it a thought until the thing was all over and too late; but as far as my life here is concerned, I can refer to every community I ever lived in, I have done the best for the uplift of everything. And if I hadn't been above the age limit to call to service, I know I would not have evaded the law. I have always done what I thought I was expected to do, and then some, and if necessary or if the country needed it, would go to the limit, life and property, anything in making personal sacrifices for it." (Trans. P. 179-180.)

POINTS AND AUTHORITIES.

I.

Defendant's motion filed prior to the answer, moving a dismissal of the Bill of Complaint on the ground "that the facts alleged therein do not constitute a cause of suit or entitle the plaintiff to the relief therein prayed for," should have been allowed by the trial court; however, this motion was denied and the same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

This motion should have been allowed. First, because Sec. 15 of Act 1906 as it relates to the instant case is unconstitutional and that the instant case is not one of the cases provided for in said act.

United States vs. Cohen Grocery, 255 U. S. Rep. 81-87.

II.

Defendant's motion filed prior to the answer moving a dismissal of the Bill of Complaint on the ground "That the affidavit of V. W. Tomilson, Naturalization Officer, attached to said Bill of Complaint and upon which affidavit, Lester W. Humphreys, United States District Attorney, instituted this proceeding by the filing of said Bill of Complaint in this court, does not show good cause therefor as required by law but on the contrary, the facts in said affidavit set forth show that there is no legal ground for the institution of this proceedings," should have been allowed by the trial court. However, this motion was denied and the same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

Cohen vs. United States, 38 App. Fed. (D. C.) 123.

U. S. vs. Sharrock, 276 Fed. 30-32.

U. S. vs. Rose, 166 Fed. 999.

U. S. vs. Rockteschell, 208 Fed. 530-125 C. C. A. 532.

U. S. vs. Norsch, 42 Fed. 417-419.

III.

Defendant's motion filed prior to the answer, moving a dismissal of the Bill of Complaint on the ground "That the cause of suit as alleged in the said bill of complaint has not accrued within five years next preceding the filing of the complaint as required by law and it so appears from the face of the bill of complaint" should have been allowed by the trial court. However, this motion was denied and the

same was then set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

In re McCarran, 29 N. Y. S. 582.
4303 Barnes Federal Code, 26 U. S. Stat. 1099.
3770 Barnes Federal Code, 34 U. S. Stat. 603.
U. S. vs. Norsch, 42 Fed. 417.
U. S. vs. Rose, 166 Fed. 999.
Sec. 1449 Barnes Federal Code, Act Feb. 28th., 1839, Chap 36, Sec. 1 and 4.

IV.

Defendant's motion filed prior to the answer moving a dismissal of the bill of complaint on the ground "That said bill of complaint was not filed in the court within the statutory period required by law, and it so appears from the face of the bill of complaint" should have been allowed by the trial court. However, this motion was denied and the same was set forth in defendant's answer and was renewed at the trial after the plaintiff rested its case, at which time it was again denied.

In re McCarran, 29 N. Y. S. 582.
4303 Barnes Federal Code, 26 U. S. Stat. 1099.
3770 Barnes Federal Code, 34 U. S. Stat. 603.
U. S. vs. Norsch, 42 Fed. 417.
U. S. vs. Rose, 166 Fed. 999.
Sec. 1449 Barnes Federal Code, Act of Feb. 28, 1839, Chap. 36, Sec. 1 and 4.

V.

That the motion of defendant filed several months before the trial of the case on its merits for the return of the original papers and letters as well as stenographic and photographic or other copies thereof

seized by the government from the defendant on an admittedly invalid and illegal search warrant in violation of defendant's statutory and constitutional rights should have been allowed in toto and not only as far as the original documents themselves were concerned.

Boyd vs. U. S. 116 U. S. 623.
United States vs. Wong Quong Wong, 94 Fed. 832.
Weeks vs. U. S., 232 U. S. 385.
Gouled vs. U. S., 41 Sup. Ct. Rep. 261.
U. S. vs. Friedberg, 233 Fed. 313.
In Re Marx, 255 Fed. 344.
U. S. vs. Lydecker, 275 Fed. 976-980.
U. S. vs. Mounday, 208 Fed. 186.

VI.

That the original documents seized by the Government from the defendant on an admittedly invalid and illegal search warrant in violation of defendant's statutory and constitutional rights and thereafter upon due and proper motion of the defendant ordered returned to him by the trial court should not again have been ordered produced by the court at the trial of the within cause for use as evidence or otherwise.

U. S. vs. Slusser, 270 Fed. 818.
Silverthorne Lumber Co. vs. U. S. 251 U. S. 386.
U. S. vs. Kraus, 270 Fed. 578-80-81-82.

VII.

That the admission into evidence on behalf of the plaintiff of the diary and especially the letters of the defendant, which documents were obtained by the government on an admittedly invalid and illegal

search warrant and in violation of the defendant's statutory and constitutional rights, over the objection of the defendant that said documents were seized by the government in violation of his statutory and constitutional rights, was improper and said documents and letters should not have been admitted and should not have been considered as evidence by the court, and that furthermore the government was debarred from using any information thus obtained by its own admittedly illegal act and in violation of statutory and constiutional provisions.

U. S. vs. Kraus, 270 Fed. 578.
U. S. vs. Mounday, 208 Fed. 186.
Silverthorne Lumber Co. vs. U. S., 251 U. S. 385.
Ex. Parte Jackson, 263 Fed. 110.
U. S. vs. Lydecker, 275 Fed. 976-980.

VIII.

That the admission of the letters of the defendant and all of them over the further objection of the defendant as to their inadmissibility on the ground of their not being competent, revelant or material was improper as no complaint in this connection of any action of the defendant is made in the bill of complaint or the affidavit attached thereto, which affidavit is the basis for the filing of the suit by the District Attorney, and that therefore said letters should not have been considered as evidence or admitted as such over the defendant's proper objections thereto.

U. S. vs. Rocteschell, 208 Fed. 530-125 C. C. A. 532.

IX.

That defendant's action in furnishing his passport to another in 1914 did not constitute cause for cancellation of citizenship.

X.

Expressions of opinions either for or against any of the participants in the world war in 1914, 1915, or 1916, or criticisms, expressions of opinions, hopes or desires that the United States would not participate in the war prior to its actual entrance therein do not show disloyalty.

In Re Watkins, 269 Fed. 466.
In Re Cluny, 264 Fed. 464.

XI.

Until the declaration of war by the United States in 1917 there was no opportunity or necessity for a naturalized citizen to make a choice or preference in allegiance.

In Re Watkins, 269 Fed. 466.
In Re Cluny, 264 Fed. 464.

XII.

When the United States entered into the world war on the side of the Allies and against Germany, there then arose for the first time the opportunity and necessity, if at all, of the defendant to make an unquestioned choice and preference of allegiance and the evidence clearly shows that this was emphatically and unmistakably made by the defendant in favor of the United States.

XIII.

As a matter of fact and of law the defendant at the time of taking his oath of citizenship owed and

had no allegiance to Germany by reason of his having voluntarily expatriated himself and having given up his rights as a German citizen and therefore could not have had a mental reservation as to his allegiance. (Defendant's Exhibit A. Tran. P. 172.)

XIV.

The defendant's letters show they were written with a heavy heart and an anguished soul and mainly for the purpose of comforting his aged parents and suffering relatives.

XV.

Although a portion of the facts herein were stipulated, the defendant as well as others testified personally covering most of the facts in the stipulation and much more in addition thereto, especially the explanations and reasons for the defendant's actions herein and the defendant voluntarily testifying and submitting himself for unreserved cross-examinations by the prosecution and the court, enabled the trial court to form its opinion on the main facts involved by personal observation and judgment, which said opinion is therefore entitled to serious consideration by the Appellate Court.

Brandt vs. U. S. 198 Fed. 449-453-117 C. C. A. 208.

U. S. vs. Marshall, 210 Fed. 595-597-127 C. C. A. 231.

XVI.

The trial court is the judge of the evidence, its weight and the inferences to be drawn and its findings or decree will not be disturbed on appeal un-

less the inferences were entirely unwarrantd by the circumstances.

Brandt vs. U. S. 198 Fed. 449-453. 117 C. C. A. 208.

U. S. vs. Marshall, 210 Fed. 595-597. 127 C. C. A. 231.

Conner vs. Martin, 46 Ind. App. 141-145. 92 N. E. 3.

Fanning vs. Green, 156 Cal. 279-284. 104 Pac. 308.

Bettens vs. Hoover, 12 Cal. App. 313 107 Pac. 329.

Wunder vs. Turner, 120 Minn. 13-15.

XVII.

Under the new equity rule the reviewing court has the right of trying the questions of fact *de novo;* but the findings below are not to be disturbed unless it clearly appears that the trial court was obviously in error.

American Rotary Valve Co. vs. Moorehead, 226 Fed. 202, 141 C. C. A. 129.
Certiorari denied 239 U. S. 641.

Weld vs. McKay, 218 Fed. 807.

Espenschild vs. Baum., 115 Fed. 793. 53 C. C. A. 368.

ARGUMENT.

Before taking up this case on its merits, respondent respectfully calls the court's attention to several preliminary motions made prior to the actual trial of the case and renewed in the answer which, had they been allowed as respondent contends they should have been, would have resulted in the dismissal of the complaint.

The Act of June 29, 1906, under which these proceedings are brought, reads as follows:

3764 Barnes Federal Code. 1919. 34 Stat. 601.

Sec. 15. *Cancellation of Certificates.* "It shall be the duty of the United States District Attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured, shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

"If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States

at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

"Whenever any certificates of citizenship shall be set aside or cancelled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

> "The provisions of this section apply not only a certificate of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws."

The first paragraph of Section 15 of the above Act as it relates to the instant case is unconstitutional in that it is vague, indefinite and uncertain. It fixes no standard of fraud or unlawful conduct. Each District Attorney may set up a standard of his own.

This statute, neither by express terms nor by implication, gives to the court authority to set aside its judgments after the expiration of the terms in which they were rendered. The first paragraph of Section 15 of the Act is directory only to the District Attorney. It prescribes his duty and then prescribes for service upon and answer of defendant.

The second paragraph of Section 15 is a statutory rule of evidence, with provisions for cancellation upon such evidence.

The third paragraph of Section 15 relates by express language to the provisions of the second paragraph and cannot by a liberal construction relate to the provisions of the first paragraph for the language of the second paragraph, "Whenever any certificate of citizenship shall be set aside or cancelled, *as herein provided,*" etc., refers to the provisions found in the second paragraph "* * it shall be sufficient in the proper proceeding to authorize

the cancellation of this certificate of citizenship as fraudulent* *". In no other part of this statute is there express language authorizing cancellation.

The second paragraph of Section 15 was intended by Congress to remedy the then common practice of aliens securing certificates of citizenship and soon thereafter proceeding to some other country where they intended to permanently reside under the protection of the United States.

The arguments and debates in Congress show this abuse was the evil sought to be corrected by this act.

The last paragraph of Section 15 gives the Act retrospective effect.

It is our contention that appropriate provision for the cancellation of certificates of citizenship on the ground urged in this suit must be found in the Act, else the judgment of the court admitting this defendant to citizenship cannot be set aside and vacated.

The order of court admitting an alien to citizenship is a judgment.

Campbell vs. Gordon, 6 Cranch 176, 182.
Spratt vs. Spratt, 4 Pet. 393, 408.
Chas. Greene's Sons vs. Salas, 31 Fed. 106.
In Re Tinn, 148 Cal. 773 (84 Pac. 152).

"It is settled by the authorities that an order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction."

Such an order is conclusive:

"An order admitting to citizenship, having the

force and effect of a judgment, is conclusive as to all matters necessarily before the court and involved in the issue."

2 Corpus Juris 1124.
Spratt vs. Spratt, 4 Pet. (U. S.) 393.
U. S. vs. Aakervik, 180 Fed. 137.

Power of Courts to Reverse or Vacate Judgments.

Courts generally have jurisdiction to reverse or vacate their own judgments and decrees during the term at which they are rendered. After the term has ended, however, the authority of the courts as to this purpose ceases, *unless extended by statute* or by motion, or by some appropriate procedure taken within the term. U. S. vs. Aakervik, 180 Fed. 137, 23 Cyc. 902.

In the Aakervik case Judge Wolverton held this act to be unconstitutional saying, "It seems clear that the act of legislation is to grant a new trial in a judicial proceeding which had otherwise become final and effective."

This decision, however, has been reversed by the Supreme Court of the United States, in the case of Johannessen vs. United States 225 U. S. 227. In this case the court held that judgments of this class are not conclusive against the public and it is competent for Congress to authorize independent proceedings to set them aside for fraud and it was further held that the retrospective feature of the act to do so is not within the *"ex post facto"* provision of the constitution, Article 1, Section 9. These were the only two points decided in the Johannessen case

We do not challenge the power of Congress to pass a statute which by appropriate proceedings would test the sufficiency of the Order of Naturalization. The point that we make is that the present statute is, first, uncertain and indefinite and, second, it does not by express terms or by implication direct the courts to vacate such judgments on the ground of fraud occuring at the time of the hearing. The only provision is for fraud occuring after the hearing, namely, when one, after having secured the order of citizenship, departs from this country within five years next thereafter. If, therefore, authority to set aside the judgment is not found in this Act, the judgment remains conclusive.

If the Act in question does apply to the instant case, then the respondent respectfully contends that the complaint is insufficient and does not state a cause of suit. The whole "meat" of the complaint is set forth in paragraph four thereof, to-wit: "That the aforesaid oath (of allegiance) so made by the defendant before said Superior Court of the State of Washington for Pacific County, was fraudulent and untrue in this, that the said defendant made said oath with a mental reservation of allegiance to said William II, Emperor of Germany, and to the State of Germany, and that the said allegiance, so reserved by the defendant aforesaid, was and is superior to the allegiance held by the said defendant to the United States of America." Respondent contends that this allegation insofar as it must necessarily rely upon the affidavit attached to the complaint

for its support (Cohen vs. United States, 38 App. (D. C.) 123) is a mere conclusion of law and based upon facts which, if true, would allow many possible inferences to be drawn therefrom, none of which would show a mental reservation on the part of the defendant. Story's Equity Jurisprudence, Vol I, pg. 263-4 states: "It is rule of equity that fraud is not presumed, but it must be established by proofs. Circumstances of mere suspicion leading to no certain results will not in either of these courts (equity) be deemed a sufficient ground to establish fraud."

In U. S. vs. Rose, 166 Fed. 999, a citizenship cancellation case, it is stated: "That averment that the judgment was fraudulently and illegally procured is a mere conclusion and of no avail unless the facts alleged show that the defendant so procured the same."

In a similar case, U. S. vs. Norsch, 42 Fed. 417-419, it is stated: "A state of facts must be disclosed by the bill, from which the court can see that the conclusion stated by the pleader to the effect that the judgment was fraudulently procured, are properly drawn."

For the purpose of this motion taking the statements of facts in the affidavit as true, the defendant is charged with having wrongfully and unlawfully procured a false passport for one Hans Boehm, at that time (1914) a German reserve or other officer whose exact official connection is unknown. The affidavit does not allege that the defendant knew of such connection; it is merely descriptive of the

person for whom he procured the passport. The affidavit also at length describes the uses to which Boehm put the false passport and again is silent as to defendant's knowledge of such purpose. The claim of the complaint is, that because the defendant secured such false passport for the said Boehm in 1914 that therefore a legal conclusion or inference or presumption of law from this fact is, that the defendant was disloyal to his adopted country, the United States, and therefore if disloyal in 1914 he must have been disloyal in 1904 at the time he was admitted to citizenship.

The entire value of the affidavit is to be decided by what are the reasonable and probable inferences to be drawn from the facts stated by the affiant. If several conclusions or deductions may be drawn from a fact, then no one of them can be a logical and probable inference that flows from such fact. The conclusion must then rest upon the proof of the facts or be left in doubt and uncertainty. The defendant in this case by his conduct set out in the affidavit certainly made no choice in his allegiance between his native and adopted country, because he may have been actuated in the passport matter by many motives, none of which would indicate that he was disloyal to the United States. The decisive point is whether the inference or conclusion is a natural and probable one.

As was said by the court in another citizenship cancellation case, United States vs. Rockteschell,

208 Fed. 530, in referring to the petition or complaint:

> "But this general averment involving as it does, possible inferences of facts as well as general conclusions of law is insufficient as a charge of perjured testimony or of other fraud." * * * "To be sufficient the petition must, in harmony with the general rule of pleading fraud, point out specifically in what particular respect the representations were false. This the petition has failed to do. Nor do the facts set up in the affidavit necessarily negative the respondents right to admission. Standing alone and unexplained it is true they raise a very substantial doubt of his right; but in the light of other circumstances and details which may have been before the court and which may have illuminated his motive and interest, that doubt may have been readily dissipated. Besides, it is not for a court in a proceeding of this character to review or set aside findings of a court of original jurisdiction, based upon conflicting evidence or upon evidence reasonable susceptible to different influences."

So the fact of the defendant's actions set forth in the affidavit "may have illuminated his motive and interest" and his actions were "reasonable susceptible to different inferences."

Therefore the affidavit, which must show good and sufficient cause for the suit, has failed to perform its requisite function and the motion to dismiss the complaint should have been allowed.

Defendant's other motions for dismissal of the complaint before the trial and again renewed in

the answer and urged upon the court after the Government rested its case, were based upon the fact that the complaint showed on its face (and the Government's case at the trial substantiated the fact) that the suit was not brought within the time limited by law.

The following are United States Statutes which have some bearing on the subject. Barnes Federal Code 1149, Act of Feb. 28th, 1893, Chapter 36, Sec. 4, provides:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."

It is also to be noted that the naturalization act provides that if a person leaves the United States within five years after the certificate is granted, it is to be considered as *prima facie* evidence of fraud.

Respondent contends that the instant proceeding is a forfeiture of a public right or grant, but even if it be not construed a forfeiture, surely it would come under the words of the statute expressed as "or otherwise."

In Re McCarran, 29 N. Y. S. 582-583, in speaking of a citizenship cancellation, the court stated:

> "It is contended, however, that the motion, being based upon alleged fraud in obtaining the order which is sought to be set aside, is barred by no limitation; but this contention is founded solely upon certain authorities holding that such

> a proceeding does not fall within the limitations prescribed in the case where irregularity or error of fact is assigned. These authorities do not warrant the assumption that no limitation (running from the date when the facts were discovered) may operate upon a motion of this character." * * *"Whatever express statutory limitation may here apply however it is not necessary to determine, for the neglect of the parties to make this motion during the great period which has elapsed is fatal to the application. No explanation is here offered for the negligence of the moving parties in this regard, the affidavit submitted tending to show that the facts constituting the alleged fraud were known to the affiants from the commencement of the period in question."

In a similar way the affidavit attached to the complaint would indicate that these facts were known to the government since 1914. At any rate, no explanation is made in the affidavit or complaint as to the reason for the dilatory action in not filing this suit until nearly seven years later.

In U. S. vs. Norsch, 42 Fed. 417-419, the court states:

> "The rights of the United States to sue for the cancellation of a certificate or decree of naturalization that has been obtained by fraud is probably co-extensive with the right now accorded to the United States to sue for the cancellation of patents that have been fraudulently procured."

Under the government's theory of this casus, the defendant by his action in 1914 made himself liable to the cancellation of his certificate of citizen-

ship at that time; five years would have therefore expired in 1919, although this suit was not filed until 1921.

It seems singular that the law should throw additional protection around a person's property rights, while denying him full protection in a right far superior—the right of citizenship. The policy of this country is to protect everyone against a dilatory threat of either criminal or civil actions or suits, for statute of limitations are to be found which cover all. In the Naturalization Act itself we find a section prescribing criminal action for misconduct occuring after the passage of the act, but even against this there is a limitation in time in the act itself. Either therefore the words "or otherwise" in the foregoing general statute of limitations in suits by the government applies to this suit or the courts must hold that in this particular class of suit there is absolutely no limitation of time whatsoever upon the government.

Some time before the above suit was started the government made a "raid" on the defendant's home and office, and secured a truck load of papers, letters and private memoranda (Search warrants Trans. p. 40-45). Thereafter and long before the trial of the instant suit the defendant, through proper motion, applied for the return of this property, alleging the search and seizure was illegal and unlawful and in violation of defendant's statutory and constitutional rights. Upon the hearing of this motion the United States District Attorney admit-

ted in open court and the court's order set forth the fact "that the search warrants in question do not comply with statutory and constitutional requirements," (Transcript. P. 48), whereupon the Court ordered returned to the defendant all the original documents but refused to order the return of copies as prayed for in defendant's motion.

Thereafter the government filed a motion for the production at the trial of the identical documents heretofore ordered returned, (Trans. P. 52) upon which motion the court made an order requiring the defendant to produce the identical documents at the trial (Trans. P. 60). At the trial these documents were admitted into evidence by the trial court subject to the objection of the defendant "that the same were incompetent, irrevelant and immaterial and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in violation of the Fourth and Fifth Amendments to the Constitution of the United States." (Trans. P. 171.)

For all practical purposes of this brief the proceedings in connection with the search and seizure feature can be reached under a discussion of the following question: Was it proper for the court to admit into evidence and to consider as such over the proper objections of the defendant, documents, letters, etc., secured by the government under an admittedly illegal and invalid search warrant and in violation of the defendant's statutory and constitutional rights? In this connection the respondent

will even go a step further and contend that not only should the documents themselves (or copies thereof) not have been admitted or considered by the court, but that by reason of its unlawful action in the matter the government was debarred at the trial from using any information received by it from these documents, without at least showing that its information was obtained from independent sources and not "the fruits of its illegal act."

The Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated," etc. This expressly creates the rights given and does not confine the same to either criminal or civil cases. That this amendment applies to civil cases is clear when one considers that the greatest of all cases on this subject, that of Boyd vs. United States, 116 U. S. 623, was a civil case for the forfeiture of thirty-five cases of glass, and therefore more or less of a quasi-criminal case as the instant case.

The elaborate decision in that case is the basis of all similar cases and in it the court used this language:

> "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws."

In the case of United States vs. Mounday, 208 Fed. 186, the court used the following language:

> "How, therefore, can the rights of the de-

> fendants 'to be secure in their persons, houses, papers and effects' be asserted by and granted to them as the Constitution guarantees, in this Court?".... "As yet, the defendants stand charged with the commission of no criminal offense in this court".... "Shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done the defendants by the ruthless invasion of their constitutional rights and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen."

And as was similarly said by Chief Justice White in Weeks vs. United States, 232 U. S. 383:

> "The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of the law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our federal system with the enforcement of the laws."

In a late deportation case, decided in 1920, Ex parte Jackson, 253 Fed. 110, it appeared that Jackson was ordered deported upon proof furnished among other things by virtue of papers, etc., seized

in an unlawful raid. The court in this connection said:

> "The law and courts no more sanction such evidence than such methods and no more approve of either than the thumbscrew and the rack."

And in speaking of defendant's constitutional rights in the deportation proceeding stated:

> "These (rights) are the fundamentals of the social compact, the basis of organized society, the essence and justification of government, the foundation, key and capstone of the Constitution. They are limited to no man, race, or nation, to no time, place or occasion, but belong to man, always, everywhere, and in all circumstances."...."And they must be defended and maintained in the face of every assault by government or otherwise. All judgments based upon their violation must be set aside."

In the last word from the United States Supreme Court in Gouled vs. United States 41 Supreme Court Reporter 261, decided in February, 1921, in speaking of these rights the court said:

> "It has been repeatedly decided that these amendments (Fourth and Fifth) should receive a liberal construction, so as to prevent stealthy encroachment upon or a 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."

In another late case decided in 1921, United States vs. Kraus, 270 Fed. 578-80, the court stated:

"Except for the character of the document seized the law in cases of unlawful search and seizure is now well settled. When seized, they must be returned, with them all copies taken while the officers retained their illegal possession. Furthermore, the prosecution may not use at the trial or in its preparation any information obtained from their scrutiny." * * * "It is apparent therefore, that not only must the papers be returned, but any copies now in possession of the respondents. A more difficult question arises to prevent any use of the information derived from their possession," * * * "The officials made the first unlawful move, and any confusion resulting from it they must undertake to clear up. The order must, therefore, provide that no testimony or other evidence of any transaction recorded in any of the papers seized shall be offered upon the trial unless the respondents can show that they got it independently of their wrongful possession." * * * "No such transaction may be proved unless respondents show before the master that they have independent proof not derived from information contained in the papers. The expense of that reference will be borne by the prosecution, through whose wrong the difficulty arose."

See also United States vs. Lydecker, 275 Fed. 976-80, where the court stated in a similar case:

"I think that the papers and letters seized and copies, if there are any in existence, should be returned. It does not appear that any testimony was gleaned from them" * * * "But if any testimony is offered at the trial that is

believed by the petitioner to have been obtained from illegally seized papers, the evidence is subject to rejection."

In the Silverthorne Lumber Co. vs. United States 251 U. So 385, referred to by the appellant herein, in which the government had returned to defendant illegally seized papers, etc., and had thereafter by motion been ordered to return them, it appeared however before returning them it had copies made thereof, and at the trial had the originals ordered produced under a subpoena *duces tecum*. The case went to the Supreme Court and in commenting on these facts, Mr. Justice Holmes said:

"The proposition could not be presented more nakedly. It is that although, of course, its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks vs. United States, 232 U. S. 382, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words, 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired

shall not be used before the court, but that it shall not be used at all."

The language then follows as given in the appellant's brief. This then is the sole case relied upon by the government for its use of evidence so unlawfully seized. We maintain that not only does this case not support their contention, but that it is a strong case in support of respondent's position.

The other cases herein cited show in what manner evidence thus obtained may be used, i. e., only when the government actually shows that it had prior knowledge or information on the subject. This is especially true where express objections to the admission of this evidence were made at the trial on the ground of its illegal acquirement by the government. In addition proper motions in this connection also were made prior to the trial. That these objections were properly made and saved is shown by Transcript of Record P. 171, where in the Statement of Evidence the following appears:

> "That all of the letters heretofore quoted and being in pages 5-24 of this Statement of Evidence, the same beginning with the letter on page 5 hereof, dated May 31st, 1915, written to one Hoerner, and ending with the letter on page 24 hereof signed H. W. B., were admitted subject to the objection of the defendant; that the same were incompetent, irrelevant and immaterial and on the further ground that the same had illegally and unlawfully been taken from the possession of the defendant on admittedly invalid search warrants and in viola-

tion of the 4th and 5th Amendments to the Constitution of the United States."

Why the appellant should now for the first time endeavor to raise a technical "dust cloud" in connection with the objection to the admission of these letters and the stipulation in this case, is unknown to respondent, unless as respondent believes the appellant for the first time realizes the fallacy of trying to maintain his former position; i. e., that he had a right to introduce these documents into evidence, especially without endeavoring to show information of the facts contained therein independent of the search warrant discoveries.

In addition to the constitutional objections to the admission of the letters respondent submits that his objection thereto on the ground of their being incompetent, irrelevant and immaterial should have been sustained because as was urged at the trial, no mention of any kind of said letters or of the actions in writing them, etc., was complained of either in the complaint or the affidavit attached thereto, and respondent submits that complaint and the affidavit must contain every fact essential to the plaintiff's cause of suit and that no evidence should have been admitted to prove any fact not alleged therein; that the only allegations made against defendant were his actions in connection with Boehm, and these letters could in no way be said to have anything to do with said actions or tend to prove or disprove the facts alleged in said affidavit, and that therefore they should not have been admitted or considered.

AS TO EVIDENCE IN CASE

On the facts in the case the question at issue, as stated by the trial court in its opinion, is: "defendant's attitude of mind in 1904 and whether he obtained his certificate of naturalization illegally by false and fraudulent representations as to his true allegiance" (Trans. P. 113), and in the beginning of its opinion the court states:

> "But, as said by Judge Hunt in Schurman vs. United States, 264 Fed. 919: 'Courts should be very careful to avoid depriving one of citizenship upon evidence which, while proving lack of allegiance at the time of the investigation, may not by relation establish that there was lack of true faith and allegiance at the time of the issuance of the certificate to the applicant'." Trans. P. 114.)

And in referring to the action of the defendant in this case, Judge Bean further stated:

> "It all relates to his acts and statements in private letters and memoranda after the commencement of the war between Germany and England and several months prior to the time the United States became involved therein. It should be interpreted in the light of this fact and not that of subsequent events." (Trans. P. 116.)

As a matter of fact the passport incident happened nearly three years before our entrance into the war and not several months prior thereto; however, the position taken by the trial court that the defendant's actions should be interpreted in the light of the facts as existed at that time, is the only

logical position to assume. Therefore, what were conditions in 1914 and thereafter up to our entrance into the war?

At that time our citizens felt free to openly express their sympathies for or against the different belligerents in the war, and these sympathies were natural and in themselves did not and could not indicate a choice between this country and their native country. The District Attorney has at some length set out the proclamation of the President of the United States, directing the citizens to remain at peace with all the belligerents and to maintain strict and impartial neutrality. And then argues that as the act of the defendant in procuring the passport for Boehm was a breach of the presidential proclamation, such breach at once made the defendant a disloyal citizen. This is a strange doctrine in view of the known facts and cannot be sustained either by a governmental policy or logic, for it will be remembered by the Court that thousands of Americans—good loyal Americans—in 1914-1915 and 1916 left the United States and went to Canada and immediately enrolled themselves in the Canadian armies, then being raised for the purpose of combat in the war, thereby forswearing their allegiance to the United States, and that later the United States Congress by a special act re-patriated these soldiers and took them into our armies. We challenge the government to proclaim that these soldiers were disloyal to the United States.

During the same period most everyone was pro-something or other; those with different sympathies were openly celebrating the victories of their favorites; foreign consuls were openly registering their nationals for service; English and German war bonds were openly offered for sale and sold throughout the United States, and everyone knew that the proceeds of the sale of these bonds were to be used for war purposes. Good American citizens not only sold these bonds but bought them. This country sold ammunition to who cared to purchase; Red Cross bazaars were held by all the war participants, and even Senators and Congressmen in the Congress of the United States were taking sides and criticizing this country for either doing or not doing certain things. None of these acts were in strict compliance with the presidential proclamations, but there is no case on record of any of the actors having been brought to trial in any court to defend their citizenship.

Even lately good and loyal American citizens and ex-soldiers of the late war enlisted under the flag of Spain for the war now being waged between Spain and Morroco. These men are not disloyal to the United States in doing this for the United States is at peace with both Spain and Morroco, and therefore while they may be making a preference of Spain over Morroco, there can be no test as to their choice of loyalty to the United States.

So it was in 1914 and similar instances could be presented *ad infinitum,* but these have been cited

in order that the Court may look at the action of the defendant in the light of the events of 1914. Not thru the darker glasses of later events. Let us presume for the sake of argument (as was possible, although perhaps not probable in 1914-1915) that events had so shaped themselves that the United States had joined on the side of Germany instead of the Allies. Would the government then have endeavored to have cancelled defendant's citizenship for his actions herein?

Keeping in view the events of those turbulent days, let us consider the defendant's action at this time only from the government's standpoint. We have first, that he assisted one Boehm to his passport and enabled Boehm to go to Germany to join the military service. The government alleges no particular motive for the defendant's action in this respect, altho the evidence was that the defendant had done so in order to have his parents assisted. It appears from the evidence that from the first dollar the defendant ever earned, he started to support his parents and at the time of the outbreak of the World War in 1914, he was their sole support, and by reason of war his remittances did not reach his people, and he knew they were suffering and in need and depending upon him for support, and that it drove the defendant nearly crazy to think that his old father in his advanced age of life had to endure those hardships and that the defendant could not go, on account of his family here. So when Boehm offered that he would go, he let him have his passport (Trans. P. 174), and further that

the thought of the consequences of his action never occurred to him and that his heart was with the place where his cradle stood and with his folks, and that he felt greviously sorry, and that was the main reason, not to help Boehm (Trans. P. 180). In reference to the letters written by defendant, the testimony shows that the defendant's family wrote him, that any ordinary letter deploring the war, was hardly ever delivered, and that was the reason he resorted to almost any means to get word to his people (Trans. P. 175).

The letters themselves show that they were written with a heavy heart and were mainly to bring a little sunshine, hope and consolation into the dark and weary hearts of his people. This can be found in almost each of the letters; take for instance the letter to his parents dated February 18th, 1916: (Trans. P. 151.)

"Dear Father and Mother:

"I have just received your dear letter and also that of dear sister-in-law, and notice with great sorrow that you were visited with so much sickness this year. It seems I would not care to live any more if you were taken from us. Father, pray that you remain well so that I may see you once more, only once, just once more. God will not take you from us, Father, so don't lose courage, and pray for me that I may stay well, in order to work so that I may give you comfort at least financially until this unhappy war is over. Take good care of yourself, Father, and too of Mother, for she too I want to see once more in this life, and also re-

quest of Mother that she pray for me, so I may get along well and be able to do for you much, much, very much yet. Everytime I take something in my hand which was given to me as a souvenir, I think of her. Tell her to take good care of herself so we can all see another once more. I have instructed the German Bank to pay you beginning with April $100 per month until the war is over, and of this money I wish for you to keep Mk 50, to give Mk to sister-in-law, and give Mk 20 to Kaspar every month. Poor Kaspar writes that he was sick and I feel very sorry that everything seem to go wrong, but hope with God's grace that everything will be better again. Never refuse the poor or hungry a piece of bread and God the Almighty will never forget us, even though sometimes things don't look the best. The war will and cannot last long anymore because this butchery is frightful. It paralyzes my hand if I just think about it. Father, if it was necessary I would come out to help you at home and to take care of you until the war is over, for here things may get along without me, but if I can do more for you here, I had better stay here. Father, you have cared for us when we were small and helpless, you have worked day and night when we needed you, and now my dear Father I am ready to give my all to make the evening of your life as pleasant as possible. I am awfully sorry for Mother because she had to suffer so much, but God will spare us for her another joyful meeting. And this prayer goes heavenwards every day, with the prayer that nothing may happen to Donat and that he will again return happily.

"Business here is very bad and I am working almost day and night to keep above water, but I never lack optimism, and as long as a person has that, things go alright. Maybe we will make something in our mines this year and we have decided to get them in operation in the near future, since the price of asbestos has gone up.

"And now, dear Father, I shall close for this time, and in the hope that this will find you, Mother, sister-in-law and children and Kaspar and family in best of health, and that the horrible war will soon come to an end, I remain as ever

"Your grateful son."

Other excerpts of letters follow: May 31st, 1915 (Trans. P. 132).

"It is horrible to think about it and the outcome makes one shudder." * * * "One can only do one thing and that is to leave all to God Almighty." * * * "Has Donat (defendant's brother) been already drafted with wife and 5 small children at home?"

Letter dated June 3rd, 1915, (Trans. P. 135):

"Neither have I heard from Father for considerable time, and as you imagine he is worried very much."

Letter of same date (Trans. P. 136):

"Only do not lose courage and everything will be allright again. It is indeed horrible about this disastrous war, and I hope it will soon be over." * * * "I have not heard from Father for some time and neither from my brothers. Donat (defendant's brother) was

already drafted last December, and will no doubt be for some time on the firing line."

Letter dated June 5th, 1915 (Trans. P. 138):

"Yes, dear Aunt, it is horrible about this war, and the end not yet in sight." * * * "My younger brother perhaps has already been drafted, since he was last fall already examined and found able. With 4 or 5 children on his hands and a sick wife, this is to be regretted." * * * "How everything will come out, God only knows."

Letter to parents dated July 26th, 1915, (Trans. P. 140):

"I learn with great sorrow that Donat had to move to the front." * * * "I am astonished that you did not get any of my letters. I have written you often. Naturally my letters are not eventless and contents may not suit. It is shuddering if one takes into consideration the many human lives which this war has already claimed.' * * * "How long this horrible war will last yet is perhaps better known to you than to us." * * * "And now, dear parents, I hope this will reach you and that all will come out alright."

Letter to his Father dated November 26th, 1915, (Trans. P. 143):

"I regret very much to know Donat is still at the front." * * * "I can well imagine how everything goes with you, with the head of the family still at the front, and with the many children and Donat's sick wife." * * * "It is immensely sad to think of the misery that has come over Germany and other countries

with an end not yet in sight." * * * "The letter of my sister-in-law was so touching, and I hope that the prayer of the little ones will be heard. I hope, dear Father, that in spite of your 70 years you will live to see the end of the war and the return of Donat, as well as a reunion of us all. Take good care of yourself so that you will always stay well. I will see that with God's help my allowance will punctually come into your hands."

Letter to his brother dated November 25th, 1915, (Trans. P. 145):

"Yes, it is sad to think that Donat with his big family at home has to suffer all possible hardships in the enemy's land. But I hope that with God's help he will again return."

Letter to his brother dated January 20th, 1916, (Trans. P. 149):

"I also received a letter from my sister-in-law, Donat's wife, and I am immensely sorry . . to read of her plight between the lines. It must be horrible to know that he is now in the bloodiest angle of the whole war, where, as I consider it, it is almost a miracle to return alive."

Letter to his sister-in-law dated February 18th, 1916, (Trans. P. 153):

"I have just received your letter and also the letter of Father and learn to my great sor- . . row that you have all been visited by sickness. It pains me intensely that in spite of all other misery you weren't spared this visitation, but trust to the divine providence of our Lord and he will make everything right again. He never forgets us if we do not lose faith in Him."

Letter to his brother dated May 8th, 1916. (Trans. P. 156):

> "One's blood stagnates, reading of the horrors of the war, and I cannot understand how the Almighty God allows that so many human lives daily, yes, hourly, are permitted to be butchered. I pray every day and at every opportunity that this terrible and unhappy war would cease." * * * "Pray for me so I may remain well and be able to help you, and I am willing to sacrifice everything to contribute my mite in this dreariest time and hour in order to alleviate the misery of the unfortunate and suffering."

And so in each letter some such thoughts are expressed and even in the letter to Hoerner, his friend and banker, who was making additional remittances to his parents, he states (Trans. P. 67):

> "Reading the news as they come from all sides, I am overcome with a feeling of sadness."

In commenting on the passport matter and these letter, the trial court stated:

> "But there is no evidence that he knew the passport was to be used, or was, in fact, used for any other purpose, and his action in reference thereto is not sufficient to show a fraudulent reservation of fidelity to Germany at the time of his admission to citizenship ten years before. The same may be said of his private letters to members of his family in Germany criticizing the policy of the United States, expressing love for his native country and a desire for her success. They were all made some months before the United States was at war

> and at a time when his native country was hard pressed by her enemies. It is common knowledge that during that time many naturalized citizens born in one or the other of the belligerent countries were in sympathy with the land of their birth and anxious for her success, and not only publicly so expressed themselves, but in other substantial ways aided and assisted her, without their loyalty to their adopted country being then or thereafter called in question." (Trans. P. 116).

There are no recorded cases which have been brought into court solely on actions occuring prior to the United States' entry into the war, as commented upon by Judge Bean in his opinion:

> "I have not been referred to a case in which a certificate has been cancelled and set aside upon such proof nor have I been able to find one." (Trans. P. 116).

There are, however, one or two cases which may have a bearing on actions of persons, prior to our entrance into the war, as the case of In re Watkiss, 269 Fed. 466, which was a petition for citizenship by Watkiss, a British subject, who after filing his declaration of intention of becoming a citizen of the United States, endeavored on two occasions before the United States' entry into the war to enlist in the British forces. The government contended that this forfeited his rights under his declaration of intention. The Court held:

> "Neither of these efforts were successful and the petitioner did not, in connection with either of them, take any oath of allegiance, nor

> register or otherwise submit himself for compulsory service—his act must be held to be that of a volunteer, which neither in fact or in law was a recognition of the authority of the British government, or an act of allegiance thereto. This being true, I find nothing in the conduct of the petitioner which could be said to be contrary to the Constitution of the United States or other than well disposed to the good order and happiness of the same. * * * The acts of Watkiss were merely voluntary acts of a person who felt the call of a righteous cause, and desired to do his part in it, with no attorning to or recognition of the authority of the British government over him."

A somewhat similar case was In re Cluny, 269 Fed. 464. In this case a German alien filed his declaration of intention prior to the summer of 1914. After the outbreak of the European war in the fall of 1914, Cluny registered for military service with the German consul at Galveston. Among other things the government contended that this registration invalidated the declaration of intention. The court on this point held:

> "I do not agree, however, with the contention of the government that this action of the applicant invalidated his declaration of intention. As before stated the statute does not in terms provide for its invalidation upon facts of the kind in question and the record wholly fails to show any fraud upon the part of the applicant at the time of making it that would invalidate it. In view therefore of the fact that that at the time of his registration the United

States was not at war with Germany (and applicant's record during the war) the petition is dismissed without prejudice."

As a matter of fact there was no opportunity or necessity for a naturalized citizen to make a choice of allegiance or give up his sympathies for either of the belligerents until our country itself entered into the war. Let us consider the defendant's position when that time came and what his answer was when he was put to the test. With aged and suffering parents in Germany, starving relatives, and brothers in the Germany army, did he simply keep quiet, which under the circumstances would perhaps have been all that was expected of him, or did he take any steps to show his love and loyalty for his adopted country? The evidence shows without even any attempt at contradiction that the defendant answered his country's call as was expected of a loyal citizen. It shows that because of his connection as former attorney for one of the belligerents, people would come to him in connection with various things and "whenever anything didn't look right" he reported it to the District Attorney; that after we entered the war he did not even try to write his people or send "them a 5-cent piece much as it broke my heart:" that among his reports to the United States Attorney there was one particular case of a man named Gorman who offered his service to the defendant to do anything that might be needed in behalf of one of the central powers, and the United States Attorney's office records bear out the facts of this

report and the facts show that this particular matter was referred to the Military Department. The defendant testified to three "plainly recollected" reports of a similar nature, none of which was denied by the government (Trans. P. 177).

The statement of evidence further shows the undisputed facts that the defendant bought Liberty Bonds with all the means he had and even invested certain trust funds in his control in these bonds; that he contributed liberally to all the war charities at all times; that he notified the Alien Property Custodian of all property belonging to alien enemies within his knowledge, even including property, such as sealed envelopes and other documents, entrusted to him by Boehm prior to Boehm's departure for Germany in 1914, and that he turned this particular property voluntarily and of his own volition over to the United States Military Intelligence Bureau of the Department of Justice (Trans. P. 178).

The undisputed evidence shows that a great deal of defendant's time was being taken up assisting in filling out questionaires for aliens and alien enemies, for which he made no charge, and that in these cases he advised the aliens to waive exemption and to "stand by the country that gave them shelter," and that a result of the defendant's efforts along these lines there were only two cases in which the aliens refused to waive exemption. A disinterested witness also testified of several cases in his own knowledge where the defendant had advised the aliens and alien enemies to go to war on behalf of the United States (Trans. P. 179 and 181).

The evidence further showed that the defendant had never been arrested, was a tax payer and that everything that he had was in this country; that he was a law abiding citizen, and that in answer to the question as to what he would do for the United States if the country needed it, he stated he would "go to the limit, life and property." (Trans. P. 180.)

These things done by the defendant were his answer to his test of allegiance. When the United States needed his support, he was not only passively loyal, but actively so. That he was always loyal to the United States is further illustrated in one of the letters introduced by the government, written by the defendant to this very man Boehm in July, 1916, in which the defendant stated, in refering to Germany and the war and defendant's actions in trying to keep the United States out of war, when he said: "I suppose they (his actions) have a bearing upon the relations had in the past with the country across the water, second dearly loved by us all." (Trans. P. 164.)

If Germany was the country "second dearly loved" surely his loyalty and allegiance to the United States had never been usurped. That this is a fact and also as showing that statements derogatory to the United States made in his letters were made mainly for the purposes heretofore mentioned and were not his true feelings, is further borne out by the undisputed fact that the defendant had the habit of keeping an exact diary during all these years in which he had a daily expense account and

"wrote down occurrences and his feelings and thoughts," (Trans. P. 174) and that he actually did write down "occurrences and his feelings and thoughts" is shown by the diary entries of October, 1914, when he set forth at some length his passport dealings with Boehm, which are the main basis of this suit. That the government seized these diaries and a truck-load of other of the defendant's letters and private memoranda and closely examined them, is not disputed and yet neither in the diaries or in the other mass of documents was the government able to find a single thought, action or utterance, derogatory to the United States, either before, during or after the war. If there had been it would have been used against him. In fact, as the trial court in his opinion remarked:

> "There is no evidence of a single act, statement or conduct indicating allegiance to or sympathy with Germany after the entry of the United States into the war, but all the evidence is to the contrary." (Trans. P. 116.)

AS TO APPELLANT'S CITATIONS

Respondent believes that the cases cited by the government herein are not in point as in none of them were the actions based upon deeds or speech occurring solely prior to the entry of the United States into the war, and if this were a criminal trial none of the evidence tending to show disloyalty or otherwise occurring prior to our entrance into the war would even be admissible.

Kammon vs. United States. 259 Fed 192, 170 C. C. A. 276.

Wolf vs. United States, 259 Fed. 388, 170 C. C. A. 364.

The value of appellant's cases therefore lose considerable of their weight which they might otherwise have had. In the case of United States vs. Wusterbath, 249 Fed. 908, cited by appellant, the Court's opinion shows that:

> "* * * it thus appears, without contradiction that the respondent, although a citizen of this country, on three separate occasions (several months having intervened between them), since the outbreak of the war with Germany, gave vent to expressions which clearly indicate that at this time he bears an allegiance to the country of his origin, superior to that which he recognizes to this country" and also that Wusterbath "did not attempt to explain or deny; his attitude was rather one of defiance."

All the facts in this case proved beyond any doubt that Wusterbath was disloyal to the United States after it had entered the war in 1917 and that he at that time had made a deliberate choice between his native country and his adopted country.

In the case of United States vs. Herberger, 272 Fed. 278, in considering the defendant's case, the court stated:

> "The plaintiff relies upon defendant's conduct and statements during the war to establish defendant's want of good faith in the alle-

gations of his petition for naturalization and oath of allegiance."

And in commenting on defendant's conduct as shown in letters written after our entry into the war even stated:

> "By itself, defendant's criticism of the 'slam bang' methods of America was not, essentially, disloyal. There are, no doubt, honest, loyal persons of reserved and phlegmatic temperments who consider persons who find relief for their exuberance in noisy demonstrations as hysterical, and who consider an affected super-heated patriotism as the 'last refuge of the scoundrel'."

The case of United States vs. Darmer, 249 Fed. 989, was brought because of defendant's action "during the Second Liberty Loan drive on or about October 17th, 1917."

The case of United States vs. Kraemer, 262 Fed 395, was for disloyal statements and actions on May 25th and 31st, 1917, after our entrance into the war, and the defendant in that case introduced no testimony whatsoever.

The only other case on this point cited by the government is that of Schurmann vs. United States, 264 Fed. 917, and Judge Hunt of this Circuit Court of Appeals in his opinion stated:

> "In behalf of the United States there was abundent evidence that, before and after the declaration of war between the United States and Germany, Schurmann * * * indicated beyond any possible doubt that his feelings

were entirely on the side of Germany against the United States."

And in the same case the court states:

"But it was in the crucial times of 1917 that the respondent failed in the fundamental obligations to his oath of true faith and allegiance in 1904. Not only did he conduct himself to May and June, 1917, as already indicated, but after the war was declared between the United States and Germany," upon being asked if he would defend the United States stated: "I have sworn allegiance to your (United States) flag or country; but I am going to tell you this much: That I didn't swear away my birthright. * * * And this is the crisis where every German, whether he is a Socialist or not, this is the time that it is up to him to defend the fatherland."

This concludes the cases cited by the appellant, and we respectfully submit that none of them are based upon facts similar to the instant case. In all of them there apparently is no question of the defendant's disloyalty after our entry into the war and in that particular the Woerndle case is not only different but on the contrary, not only is there no evidence of his disloyalty after this time, but the evidence is all to the contrary, showing active and positive evidence of his complete loyalty and allegiance to the United States.

It is a well settled rule of equity "that fraud is not to be presumed, but it must be established by proofs. Circumstances of mere suspicion leading to no certain results will not in equity be deemed a

sufficient ground to establish fraud." (Story's Equity Jurisprudence, Vol. I., P. 263-4). And, as is said in United States vs. Simon, 170 Fed. 680-682, "so far as the United States relies upon fraud it is bound to prove the fraud. This might have been inferred sufficiently from admitted facts." * * * "As the burden of proof rests upon the government, however, this inference is not cogent enough to warrant this court in finding that he (Simon) obtained his naturalization by fraud."

And as to the strength of the proof required, we beg to refer to United States vs. Albertini, 206 Fed. 133-134, where it is held:

> "There is evidence tending to prove the allegations in reference to defendant's anarchism, but under the circumstances it was not the clear, strong, convincing proof necessary to the cancellation of a public grant, to which naturalization is analagous."

We also call the Court's attention to the much stronger language of the court in United States vs. Sharrock, decided November 5th, 1921, and reported in 276 Fed. 30-32. Quoting the Court in said case:

> "In no case of like circumstances, much less in one of the character of the present suit, will a court of equity be satisfied that justice . . be done by a decree in accordance with the prayer of the bill. To deprive a man of his priceless possession of an inestimable right to American citizenship, there must be full proof. Nothing will warrant cancellation of his evidence, that in quantity and quality inspires con-

fidence and produces conviction of the truth of the charge, virtually beyond reasonable doubt."

Additional strong proof that the respondent herein had no preference of allegiance to Germany over that to the United States is borne out by the undisputed testimony of the defendant that "in order to get away and avoid military duty (in Germany at the time of his emigration to the United States) he applied for and was given a certificate renouncing (his) German citizenship and releasing him from liability for military service." (Trans. P. 172.) And it is further undisputed "that said certificate deprived him of any vestige of German citizenship" (Trans. P. 172). And a copy of the original certificate of expatriation and forfeiture of any and all his rights as a German citizen was admitted without objection into the evidence. (Defendant's Exhibit A.) Not only does this show the defendant had even then (1897) officially and formally expatriated himself from Germany and renounced his citizenship thereof, but it tends to prove that he owed no allegiance to Germany at the time of his oath of allegiance to the United States and therefore, as a matter of fact and of law could not have taken a false oath of allegiance with a mental reservation therein in favor of Germany or its rulers.

PRESUMPTIONS IN FAVOR OF TRIAL COURT

This brings the discussion down to the question of the presumptions in favor of the decision of the

lower court and what weight or consideration is to be given thereto by this court. Counsel for the government states in his brief:

> "The passport fraud and the letters were stipulated. The Court is not asked here to review a finding made on conflicting testimony where the trial judge was aided by personal observation of the witnesses." (Appellant's Brief, P. 18.) Also: "The facts here discussed are admitted. Most of them are recited in the stipulation of facts and the others for the greater part are Woerndle's admissions on the witness stand." (Appellant's Brief, P. 64.)

If the facts are admitted then the fact of Woerndle's explanation for his actions is one of the admitted facts and under this explanation the government can find nothing with which to substantiate its allegations of fraud and mental reservation, and this being the fact the complaint would fall by itself.

As to the appelant's statement to the effect that the facts were mostly stipulated, this is only a statement liable to be misinterpreted by this court without additional explanation. It is true that a great many of the facts were stipulated, but in addition the defendant and his witness testified orally and personally before the trial court and in their testimony covered each and every one of the stipulated facts and a great many others, and in doing this and in explaining his actions herein, the motives and reasons therefore, etc., the defendant voluntarily subjected himself to unlimited cross examination by the government and the court, and it is from

this testimony adduced on the witness stand, direct and by cross examination, which enabled the trial court to have the advantage of seeing and hearing the witnesses and the opportunity to observe their actions and demeanor and to assist in forming an opinion as to their credibility and trustworthiness. This was especially true in this case because of the necessity of drawing inferences from facts, which without these aids might otherwise perhaps have been subject to different, although improbable and unreasonable inferences. The trial judge performed his duty conscientiously in this respect (for as shown from his opinion he not only examined the cases cited by the plaintiff in its behalf, but he also endeavored to find other cases which might have substantiated that view), and in his decision he makes statements as to what the facts in the case really are and what additional inferences or conclusions, if any, are to be drawn therefrom (Trans. P. 113).

How different the facts of the trial in this case are from that cited by appellant, to-wit: Booth-Kelly Lumber Co. vs. United States, 203 Fed. 423-429, 121 C. C. A. 533, where this Court stated the facts to be as follows:

> "The findings in the Court below were made upon evidence which had been taken before an examiner, and not in open court, and they are not attended with presumptions in favor of findings which are made upon conflicting testimony, where the trial judge has the opportunity to observe the demeanor of the witnesses."

And in the same case in 237 U. S. 481, the Court said:

> "The issue is purely one of fact upon matters with regard to which the Circuit Court seems to have been prevented from coming to the same conclusion as the Circuit Court of Appeals rather by presumption in favor of the patents than by its disbelief in the testimony of the defense."

The conditions in the Booth-Kelly case and the instant case are therefore entirely unlike; in one the testimony was taken before the trial court, in the other before an examiner, and in addition the change in opinion was mostly caused as said by the Supreme Court "rather by the presumption in favor of the patents than by its disbelief in the testimony of the defense."

The same facts are true of another case cited by appellant, to-wit: The Santa Rita, 176 Fed. 890-893, which was a decision by this Court and Judge Hunt clearly shows in the opinion of the Court that the testimony in question was not oral, and that therefore the trial court did not have the advantages which it had in the Woerndle case. In the Santa Rita case Judge Hunt states:

> "In our examination of the evidence, which has led us to the conclusion that the learned judge of the lower court erred in his finding upon this point, we observe that libellant's principal witnesses, who gave direct evidence thereon, testified by deposition. Upon this matter, therefore, the trial judge had not the advantage of seeing and hearing the witnesses.

> His position, to arrive at a true result, was scarcely better than ours. Hence the rule that, when oral testimony is evidently the basis of the finding, or the written testimony relates to matters as to which the trial judge is better able to reach a satisfactory conclusion than the appellate court, the findings will be adhered to, does not apply with the same force."

In the Woerndle case, therefore, it seems that insofar as "the oral testimony was evidently the basis of the finding" or "the written testimony relates to matters as to which the trial judge was better able to reach a satisfactory conclusion" that under these controlling circumstances it should not be made an exception to the general rule, but that the usual presumptions of the trial court's decision should be indulged in.

A very interesting case in this connection, in which the Booth-Kelly case, *supra,* and the Santa Rita case, *supra,* were mentioned by another Federal Appellate Court is that of the United States vs. Marshall, 210 Fed. 595, 127 C. C. A. 231. This was a proceeding by the government to cancel a patent alleged to have been obtained by fraud. On appeal the Circuit Court stated:

> "To secure a reversal upon such a basis as that just mentioned the appellant must convince us not only that the trial court may have been wrong, but that it was manifestly wrong. There must, under the holdings of this court have been 'obvious error' of law or a 'serious mistake' in dealing with the facts." * * * "The error must be clear and palpable." * * *

"The conclusion of the trial court is 'presumptively right'." * * * "Some distinction relieving from this rule is claimed in the present case because the testimony was not taken before the judge but before the examiner, and it is said under such circumstances, this court is in as favorable a situation to deal with the matter as was the court below. U. S. vs. Booth-Kelly Lumber Co., 203 Fed. 423, 121 C. C. A. 533, from the Ninth Circuit, is cited to this point. But the question is not so much one of situation to decide as of where the law places primary determination of questions of fact. While no doubt the circumstances that the district judge personally heard the witnesses tends to strengthen the presumption in favor of his conclusion—a consideration mentioned by this Court in Coder vs. McPherson, 152 Fed. 951—and by the Circuit Court of Appeals for the Ninth Circuit in The Santa Rita, 176 Fed. 890. the fact that he did not hear such witnesses, but that the proofs before him were entirely by deposition, or upon examiner's report, does not destroy the presumption. Such still exists in favor of his conclusion. To hold otherwise would in effect be to make this the court of first instance. The District Court is not in such matters a mere conduit. It, not this court, is the trial court. Our functions are simply to guard against manifest error on its part, and this is true whether such arises upon hearing witnesses or upon reading a record. Starting with this presumption in favor of the decision of fact below, is there apparent error in the court's determination of either of the matters mentioned? We believe not."

To the same effect was the decision of this Ninth Circuit Court of Appeals in United States vs. Rockteschell, 208 Fed. 530, 125 C. C. A. 432, and heretofore cited, where the court held:

> "Besides, it is not for a court in a proceeding of this character (cancellation of certificate of citizenship) to review or set aside findings of a court of original jurisdiction, based upon conflicting evidence, or upon evidence reasonably susceptible to different inferences." * * * "The correctness of a finding of fact, so long as the same is within the bounds of reason, involves no question of law, and cannot be reviewed or disturbed."

Applying this reasoning to the Woerndle case, the only issue was one of fact, to-wit: Did Woerndle hold a mental reservation as to his allegiance at the time of taking his oath of citizenship in 1904? The trial court has found as a matter of fact that he did not.

That this fact, as well as other facts were set forth in the decision and opinion of the trial court, rather than in a formal "Finding of Facts" should make no considerable difference. The citation of the appellant to the case of Hendryx vs. Perkins, 123 Fed. 268-270, is not in point on the question of the distinction, if any, between a decision or opinion of the court and formal findings. The appellant gives this case as authority for the statement that "an opinion of a trial judge in an equity case is not a finding and statement of facts." (Appellant's Brief, P. 18.)

The case cited while is contains the above statement, at once explains and qualifies the same as follows:

> "The opinion regarding such question is only of the very able trial judge who gave it upon an abstract proposition as distinguished from an adjudication upon a point actually in issue."...."In the present case, however, as fully explained in our prior opinions, the decree of the Circuit Court appealed from necessarily implied a finding of facts."

So the decree appealed from here is necessarily from the finding of facts and the inferences drawn therefrom as stated in the trial court's decision.

Neither does the so-called new equity rule change the procedure and presumptions due the trial court in an equitable appeal, as said in American Rotary Valve Co. vs. Moorehead, 226 Fed. 202, 141 C. C. A. 129, by the Seventh Circut Court of Appeals:

> "Under the old rules, the finding of the trial court were entitled to be treated as very persuasive, and such findings were not disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases are ordinarily to be heard in open court by the trial judge, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration, is the opportunity of the trial judge to estimate the credi-

bility of the witnesses by their appearance and demeanor on the stand." Citing Espenschild vs. Baum, 115 Fed. 793. A writ of certiorari was thereafter denied in this case, 239 U. S. 641.

And in the case of Espenschild vs. Baum supra, referred to, it was held:

> "The assignment of errors presents the sole question whether the decree should be reversed on the evidence. A careful consideration of the evidence in the record convinces us that the decree was right. But if the conflicts in the evidence were greater than we find them, a reversal would not be justified, since the court at the trial had the opportunity (which we have not) of judging of the credibility of the witnesses by their appearance and demeanor on the stand. Under such circumstances, a very clear and palpable error in the facts must be shown on appeal."

Even where there is no conflict of evidence the presumption is in favor of the trial court's opinion. Weld vs. McKay, 218 Fed. 807, Seventh Circuit Court of Appeals, where it was said:

> "The facts found by the chancellor will be presumed correct, unless the record shows an egregious blunder, or an error in the application of the law, resulting in manifest injustice. The pertinent issue of fact was determined solely upon the testimony of McKay and counsel urges, that the foregoing rule applies only where there is a conflict in the evidence. This is not so. The evidentiary facts may all be made known from the mouth of a single witness, and

> yet the ultimate fact as determined by the chancellor is just as persuasive as if the evidentiary facts had come from many witnesses."

See also Wunder vs. Turner, 120 Minn. 13-15, where it is also held that "The rule applies to inferences from undisputed facts and to documentary evidence."

Considering this case therefore from all angles, the constitutional and statutory objections to the complaint itself; the introductions and consideration of testimony admittedly secured by the government in violation of the respondent's constitutional and statutory rights; the fact that all the respondent's acts complained of occurred long before the entrance of the United States into the world war; the further fact that these actions were not intrinsically malicious in intent, but were caused by what may perhaps be termed "mitigating circumstances"; the fact of respondent's active and unmistakable loyalty to the United States after its entrance into the war; the fact of respondent's voluntary expatriation and of renunciation of his German citizenship and the fact of the trial court's finding in his favor; and the further fact that the respondent and his family, who are prominent in social and business life of their community have suffered untold pain and humiliation through the wide publicity given to his actions in this case, we respectfully submit that equity and justice will not demand any further punishment through the loss of the respondent's citizenship herein by a reversal of the trial court by this Circuit Court of Appeals,

and that as a matter of law and fact the decree of the trial court should be affirmed.

If respondent's brief herein seems rather lengthy, counsel asks the court's indulgence thereof, as the responsibility resting upon him in the case of protecting the respondent's inestimable privilege of citizenship warranted an exhaustive review of the matter.

Respectfully submitted.

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